Supreme Court, U. S.
FILED
JAN 8 1976
MICHAEL RODAK, JR., CLERK

No. 75-612

In the Supreme Court of the United States

OCTOBER TERM, 1975

GRADY QUICKSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his conviction on eight substantive counts improperly resulted from the introduction of hearsay declarations of his co-conspirators under a later dismissed conspiracy count. He further argues that the trial court erred in failing to dismiss two counts of the indictment for failure of proof.

After a jury trial in the United States District Court for the Southern District of West Virginia (C.A. App. 4), petitioner was convicted of conspiracy to distribute narcotics in violation of 21 U.S.C. 841(a)(1) and conspiracy to travel interstate with the intent to promote, manage or facilitate a business enterprise involving narcotics in violation of 18 U.S.C. 1952 (count one);[1] traveling interstate with intent to promote, manage or facilitate an

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[1]Mary Jane Quicksey, Beatrice Graves, Alfred Dumeur and Cora Moore were indicted along with petitioner on the conspiracy count only (count one). The jury returned verdicts of guilty against Dumeur and Mary Jane Quicksey and not guilty as to Graves; the indictment was dismissed as to Moore (C.A. App. 4-5).

unlawful narcotics enterprise and wilfully performing acts facilitating such activity, in violation of 18 U.S.C. 1952 (counts two, seven, eight and nine); distribution and possession with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1) (counts four, five and six); and managing and supervising an illegal narcotics business, in violation of 21 U.S.C. 848 (count ten).[2] Petitioner was sentenced to an aggregate of thirty years' imprisonment without parole, in addition to fines totalling $240,000 (C.A. App. 4). The court of appeals affirmed (Pet. App. 13-21).[3]

1. Count two of the indictment was based on evidence showing that, in the fall of 1971, petitioner made at least one trip to Buffalo, New York, where he obtained a large quantity of heroin (C.A. App. 117). A former heroin addict and salesman for petitioner, Deotis Brown, accompanied petitioner on this trip (*id.* at 90-91). At petitioner's trial, Brown testified that he took a portion of the heroin obtained by petitioner and that he distributed twenty to twenty-five bags of heroin for petitioner approxmately three times a day (*id.* at 91, 100).

William O'Dell Harris, another drug salesman for petitioner, also testified at trial. Harris was given 200 bags of heroin by petitioner to "get rid of." He gave 100 bags to

[2]The court entered a judgment of acquittal on count three before the case went to the jury.

[3]The court of appeals withheld judgment on the conspiracy count (count one) because of the ambiguity as to whether the jury had found the defendants guilty of conspiracy to violate the Travel Act (18 U.S.C. 1952), in violation of 18 U.S.C. 371, or of conspiracy to violate the narcotics laws, in violation of 21 U.S.C. 846 (Pet. App. 16-17). The trial court had imposed the greater sentences authorized by 21 U.S.C. 846. Thereafter, the conspiracy count of the indictment under which petitioner was indicted and convicted was dismissed as to him. This resulted in no reduction of the 30-year prison term but only in a $25,000 reduction in the fine, to a total of $215,000.

Deloris Middlebrooks and 100 bags to Hubert Tyler (count four). Petitioner was to receive $1,400 from the sale of this heroin, and Harris would receive $250 (*id.* at 132-134). On three or four other occasions, Harris received approximately fifty bags of heroin from petitioner (*id.* at 135). Harris then gave this heroin to Hubert Tyler and Nancy Joann Thompson for resale (count five) (*id.* at 137-138).

Alfonso "Buddy" Oliver, a named co-conspirator, testified that he had been a heroin salesman for petitioner for a period of time in 1972. On one occasion, Oliver received fifty bags of drugs from petitioner; after determining that the drugs were good, he obtained another 150 to 200 bags from petitioner (C.A. App. 290-291). Oliver was able to sell the bags in about a day and a half, and he gave petitioner approximately $1,500 to $1,800 from these sales (*id.* at 291). Oliver sold petitioner's narcotics for approximately six weeks; when the "dope" was good he would sell an average of 100 to 150 bags per day at ten dollars a bag (*id.* at 291-292). He gave the money he received from these sales to petitioner (*ibid.*).[4]

Marie Curtis, a named co-conspirator, was another witness at petitioner's trial. She testified that she had traveled to New York City in June of 1972; en route she stopped in Pittsburgh and spoke to petitioner by telephone (C.A. App. 338, 340-341). Petitioner told her to continue to New York and that he would fly there on the following day (*id.* at 341). The next day, Curtis picked up petitioner at the airport in New York. Thereafter, she telephoned Al Dumeur, whereupon Dumeur and petitioner discussed the purchase price of narcotics (*id.* at 344). Later, petitioner and Curtis proceeded to Dumeur's poolroom in Harlem, and petitioner entered a back room with Joseph "Jomo"

[4]Heroin distribution in conjunction with Alfonso "Buddy" Oliver was charged against petitioner in count six of the indictment.

Curtis, a named co-conspirator, and Dumeur (*id.* at 345). Thereafter, Marie Curtis was given some "stuff" to carry back; at Lexington, Virginia, she gave the drugs to co-conspirator Mary Jane Quicksey (*id.* at 352).[5]

Sharon Lee Stamper, another named co-consipirator and trial witness, traveled from Charleston, West Virginia, to New York City in August of 1972 (C.A. App. 507-508, 510). She and Joseph "Jomo" Curtis purchased $1,200 worth of heroin with petitioner's money (*id.* at 513-514, 518-519). Stamper transported the heroin to Montgomery, Alabama, on a bus, while "Jomo" Curtis flew from New York to Montgomery (*id.* at 519-520). Curtis picked up Stamper in Montgomery, and they both proceeded to Charleston, West Virginia (*id.* at 520). The heroin purchased in New York was subsequently given to petitioner (*id.* at 521).[6]

In July of 1972, Julia Jean Monroe, a named co-conspirator who also testified for the prosecution, traveled from Beckley, West Virginia, to New York City, where she met petitioner (C.A. App. 645, 648). Thereafter, petioner gave Monroe a plastic bag containing drugs, which she inserted into a carrying case (*id.* at 650). Petitioner gave her some money for a bus ticket, and she took a bus from New York to Bluefield, West Virginia. From Bluefield, she proceeded by taxi to Beckley (*id.* at 651, 653). The narcotics in her possession were then delivered to petitioner's house (*id.* at 654).[7] On cross-examination, Julia

[5]This trip pertained directly to count seven of the indictment, which charged a violation under the Travel Act (18 U.S.C. 1952).

[6]This evidence directly related to count eight of the indictment, which charged a violation under the Travel Act (18 U.S.C. 1952).

[7]This evidence related directly to count nine of the indictment, which charged petitioner with having an accomplice travel interstate between West Virginia and New York to promote a narcotics business involving heroin (C.A. App. 11).

Monroe testified that the drug picked up in New York was cocaine and not heroin (*id.* at 676).[8]

2. Petitioner contends that hearsay declarations of his co-conspirators were improperly introduced at trial because there was insufficient independent evidence of a conspiracy, and that this hearsay evidence improperly contributed to his conviction on the eight substantive offenses with which he was charged.

Significantly, petitioner does not point to a single specific example of allegedly inadmissible hearsay evidence used against him. Nor could he. For the testimony that we have summarized of William O'Dell Harris, Alfonso "Buddy" Oliver, Marie Curtis, Sharon Lee Stamper, Julia Jean Monroe and others was, for the most part, not hearsay at all but direct evidence of meetings, transactions and trips in which those witnessess had participated that supported both the conspiracy and substantive counts of the indictment. A review of the record demonstrates that this non-hearsay evidence was ample to establish the fact of a conspiracy and of petitioner's participation therein. Thus, the requirement that there be independent evidence of a conspiracy before hearsay statements of co-conspirators are admitted was fully satisfied in this case.

As for petitioner's claim that the hearsay evidence improperly contributed to his conviction on the substantive counts, it is established that the hearsay declarations would have been admissible even had petitioner been indicted only on the substantive counts, since there was independent proof, apart from any hearsay evidence, that he was engaged in a joint criminal venture. See, *e.g.*, *United States* v. *Snyder*, 505 F.2d 595 (C.A. 5), certiorari denied, 420 U.S. 993; *United States* v. *Everidge*,

[8]The evidence relating to count ten of the indictment is set out at pp. 7-8, *infra*.

488 F.2d 1 (C.A. 9); *Ottomano* v. *United States*, 468 F.2d 269, 273 (C.A. 1), certiorari denied, 409 U.S. 1128; *United States* v. *Binder*, 453 F.2d 805, 809 (C.A. 2), certiorari denied, 407 U.S. 920; *United States* v. *Hoffa*, 349 F.2d 20, 41 (C.A. 6), affirmed, 385 U.S. 293; *United States* v. *Annunziato*, 293 F.2d 373, 378-379 (C.A. 2), certiorari denied, 368 U.S. 919.

3. Petitioner's contention that the trial court erred in refusing to dismiss two counts of the indictment for failure of proof is likewise without merit.

a. Petitioner contends that the government failed to prove a material element under count nine, which charged him with violating the Travel Act in July of 1972 by having an accomplice (Julia Jean Monroe) travel between New York City and West Virginia to promote a narcotics business involving heroin. The principal witness to this transaction was the accomplice, who testified that the drug she transported for petitioner was cocaine, not heroin. No other witness identified the drug.[9] Petitioner asserts that this variance required dismissal of count nine, but the court of appeals correctly concluded (Pet. App. 18-19):

> We find no prejudice in the variance between the allegation of heroin and proof of cocaine in Count IX. Both drugs are narcotics. The gist of the charge in Count IX is engaging in interstate travel to promote a narcotics business. The type of narcotics is immaterial, unless Quicksey was misled and taken by surprise or unless he could not be protected against subsequent prosecution.
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> Count IX fully informed Quicksey of the specific offense with which he was charged by allegations

[9]The evidence relating to this count is set out at pp. 4-5, *supra*.

that named his accomplice and described the interstate travel as taking place between West Virginia and New York. The evidence disclosed that this was the only trip of this nature made by the accomplice, that heroin and cocaine in the form in which they were transported are similar in appearance, and that Quicksey did not even mention the name of the drug when he commissioned its transportation for his narcotics business. Thus, it is apparent that Quicksey was fully informed of the material details of the interstate travel for which he was charged, and that the trip was so unique that he could not be prosecuted again for the same offense. We conclude, therefore, that no prejudice has been shown and that no error was committed in denying his motion for a judgment of acquittal on Count IX because of the variance. *Cf. United States* v. *Ramirez*, 482 F.2d 807, 817 (2d Cir. 1973); *United States* v. *Schrenzel*, 462 F.2d 765, 769 (8th Cir. 1972). [Footnote omitted.]

b. Petitioner also claims that the trial court erred in failing to dismiss count ten of the indictment, which charged petitioner with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Petitioner does not allege that there was insufficient evidence upon which the jury could have found that petitioner had engaged in a continuing criminal venture as the principal manager and supervisor, but he asserts that the government failed to prove an element of 21 U.S.C. 848, *viz.*, that he obtained "substantial income or resources" from this continuing illegal enterprise.

The record plainly reveals that petitioner did in fact derive substantial profit from this continuing criminal enterprise involving the distribution of narcotics. The evi-

dence established that petitioner was the central figure in a large-scale narcotics distribution network, that his narcotics salesmen were selling substantial quantities of narcotics daily (on many occasions more than 100 bags per day), that several trips were made out of state to purchase narcotics, and that large quantities of money changed hands. In these circumstances, the jury was fully justified in finding petitioner guilty of the substantive offense of engaging in a continuing criminal enterprise from which he derived "substantial income or resources." See *United States* v. *Sisca*, 503 F.2d 1337, 1346 (C.A. 2), certiorari denied, 419 U.S. 1008.[10]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[10]In support of his argument, petitioner suggests (Pet. 10) that "substantial income" as set forth in Section 848 means "a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year * * * , and which for the same period exceeds fifty percent of the appellants declared adjusted gross income under Section 62 of the Internal Revenue Code of 1959" (emphasis omitted). However, this is the definition of "substantial source of income" as set forth in 21 U.S.C. 849(e) and applicable to that Section alone. See *United States* v. *Collier*, 358 F. Supp. 1351, 1355-1356 (E. D. Mich.), affirmed, 493 F. 2d 327 (C.A. 6). Accordingly, petitioner's contention that the government failed to meet its burden of proof under Section 848 because it failed to introduce evidence of petitioner's adjusted gross income during previous years (Pet. 11) is without merit.